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PETITION FOR A WRIT OF CERTIORARI

Milma Garcia-Ramos hereby petitions for issuance of a writ of certiorari to the United States Court of Appeals for the Second Circuit to review its decision in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. A-1) is published at 413 F.3d 234 (2d Cir. 2005). The court of appeals' order denying rehearing en banc (Pet. App. A-32) is unpublished. The opinion of the district court granting Respondents' motion for summary judgment (Pet. App. A-32) is published at 33 Employee Ben. Cas. (BNA) 2455 (Jun. 7, 2004), and is available in computer database at 2004 U.S. Dist. LEXIS 25237 (S.D.N.Y. Jun. 7, 2004), and 2004 WL 1276952.

JURISDICTION

The judgment of the court of appeals was entered June 23, 2005. Petitioner's timely request for rehearing en banc was denied on August 19, 2005, less than ninety days before the filing of the instant Petition. 28 U.S.C. § 2101(c); Supreme Court Rule 13(3). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The case involves certain provisions of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. 1001 et seq.

In pertinent part, 29 U.S.C. § 1001 declares:

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with the national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations . . . that owing to the lack of employee information and adequate safeguards regarding their operation, it is desirable in the interest of employees and their beneficiaries, and to provide for the general welfare, and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are provided preferential Federal tax treatment . . . .

In pertinent part, 29 U.S.C. § 1132 provides that:

(a) a civil action may be brought
* * *
(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter, or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this subchapter or the terms of the plan.

In pertinent part, 29 U.S.C. § 1104(a)(1) states that:

a fiduciary shall discharge his duties with respect to the plan solely in the interest of the participants and beneficiaries

(A) for the exclusive purpose of:

(1) providing benefits to participants and their beneficiaries; and

(2) defraying reasonable expenses of administering the plan

* * *

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

STATEMENT

1. Due to a debilitating depression resulting from traumatic injuries, Petitioner Milma Garcia-Ramos ("Mrs. Garcia") was forced to end her employment on June 10, 1996. At that time she had worked fourteen years at St. Luke's-Roosevelt Hospital, a participating employer in the 1199 Health Care Employees Pension Fund ("the Fund"). In the following year, at the suggestion of a physician, and with the help of one of her daughters, Mrs. Garcia applied for Social Security Disability benefits ("SSD"). On October 22, 1997, the Social Security Administration ("SSA") ruled favorably on the application, having determined that Mrs. Garcia was incapable of engaging in any form of substantial gainful activity since the last day of

her employment. Soon thereafter, SSA began making monthly payments to Mrs. Garcia and, in addition, made a lump sum retroactive payment going back to December 1996, the first month following expiration of the five month statutory waiting period. 42 U.S.C. § 423(c).

2. It is undisputed that, at this point, Mrs. Garcia met all of the substantive requirements for a disability pension. It is also undisputed that had she applied for a disability pension then, or at any time prior to December 1998, she would have been entitled to start receiving monthly payments as well as a retroactive award for the period beginning December 1996, the same starting date as her SSD retroactive award. This result would have accorded with Section 8.1 of the plan of the 1199 Health Care Employees Pension Fund ("the Plan") which provides that "the payment commencement date of the Disability Pension Benefit, shall be the first day of the month in which the payment of the Participant's Social Security disability benefits commence(d), but not earlier than two (2) years prior to the date of filing of the application for the Disability Pension Benefit with the Fund Office."[1] The

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[1] Section 8.1 of the Plan provides that: "A participant who is totally and permanently disabled, as evidenced by his having been awarded Social Security disability benefits, and who has completed at least five (5) years of Credited Service and/or Vesting Credit shall be eligible to receive a Disability Pension Benefit provided that the condition or event giving rise to the total and permanent disability commenced or occurred on or before the last day of Credited Service, and the Participant's employment with a Contributing Employer terminated as a result of such condition or event. Subject to paragraph 4.3 [a provision not relevant to the instant case], the payment commencement date of the Disability Pension Benefit, shall be the first day of the month in which the

sole reason for Mrs. Garcia's failure to make such a timely application was her debilitating depression.

3. Mrs. Garcia had no incentive to delay. On the contrary, it was in her interest to apply as soon as possible. Had Mrs. Garcia applied then, or at any time within the two year period, she would have immediately had the enjoyment of a full retroactive benefit and a significant increase in her monthly income, along with the time value resulting from the earlier receipt of these monies. Conversely, because she did delay, the Fund was able to receive their time value by investing them for its own profit and gain.

4. Four years later, one of Mrs. Garcia's daughters, Yvette Penalver-Thomas, in anticipation of moving from New York to Georgia, reviewed her mother's papers to determine if there were any matters that needed further attention. In making the review, Mrs. Penalver-Thomas found documents relating to the Plan, and soon thereafter, on July 26, 2001, brought her mother to the Fund's office and helped her apply for the disability pension. On August 27, the Fund's Retirement Committee ("the Committee") awarded her benefits but with a retroactive payment effective as of August 1999. The retroactive payment therefore did not cover the first thirty-two months of her entitlement to Social Security Disability benefits, the period she would have been entitled to receive benefits had she applied before December 1998.

5. On October 6, 2001, Mrs. Garcia's other daughter, Mercedes Penalver, asked the Fund to reconsider its limitation of her mother's award. Ms. Penalver

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payment of the Participant's Social Security disability benefits commence(d), but not earlier than two (2) years prior to the date of filing of the application for the Disability Pension Benefit with the Fund Office."

supported this request with an affidavit in which she explained that her mother's

> quality of life and ability to tackle daily routines have dramatically changed since [the accident] . . . . The injuries she has sustained have altered her day to day life so greatly that she relies on her family to assist her with everything–including the simplest of daily tasks. Since 1996, my sister, Yvette Penalver-Thomas and I have assumed the responsibilities of escorting our mother to all doctors' appointments, examinations, etc. Our mother is in too fragile of a physical and emotional state—not only to travel alone–but to conduct any affairs regarding her personal well-being. Incidentally my sister . . . reminded my mother of her entitlement to pension benefits–poor memory is included as one of the symptoms of her injuries. . . . Our appeal is sincere and valid—my mother's state of health has hindered her from proactively coordinating her plans for a secure future.

With the affidavit, Ms. Penalver enclosed medical reports, including a detailed letter and a psychiatric narrative dated October 4, 2001. In his letter, Hugo H. Morales, M.D., Mrs. Garcia's psychiatrist, noted her complaints of "frequent and prolonged crying spells, lack of concentration, poor memory, apathy, anhedonia, inability to go out herself, frequent panic attacks as well as pain in her head, neck, left shoulder and hip." He confirmed that her "predicament" began when she was injured and that she continued to be "preoccupied with all kinds of somatic manifestations." Based on what he had observed since he began treating her on February 10, 1997, she had been "totally dysfunctional; her depression so

severe that she [was] not in good contact with reality." At times, she was "disoriented and [did] not know the month and year," and her "ability to relate properly to her environment, to make proper decisions or to remember events is grossly impaired." Dr. Morales diagnosed her with "Major Depressive Disorder, Chronic, Severe," and described her prognosis as "Guarded."

6. On December 18, 2001, the Fund responded with a short letter citing Plan Section 8.1. On June 6, 2002, Mrs. Garcia's newly retained lawyer sent the Fund a letter, reiterating the reasons for her late application, and asking that equitable tolling be applied so that Mrs. Garcia would not be penalized for a delay that was a consequence solely of her mental impairment.

7. At a meeting held on August 8, 2002, the Committee voted to uphold the reduction in benefits. Four days later, in a letter explaining the decision, Roderick Gorham, the Director of the Fund, stated that a delayed application could never be equitably tolled because the relevant plan provision was "not a procedural rule akin to a statute of limitations (i.e., an absolute bar to receiving benefits under the Plan), but a substantive rule governing the amount of benefits payable to a Plan participan' Mr. Gorham also asserted that "even if the equitable tolling doctrine applied to Section 8.01 of the Plan," it would be inappropriate to apply it in this case because Dr. Morales had "stated that Ms. Garcia suffered from a mental disorder since February 10, 1997." In Mr. Gorham's view, the psychiatrist's use of that date--which was also the date of her first appointment with him--demonstrated conclusively that he believed she could have applied for benefits before then. Moreover, according to Mr. Gorham, the papers submitted on Mrs. Garcia's behalf proved that her delay in filing was due to "lack of knowledge of, or

failure to remember" her benefit entitlement, unlike "the typical case in the equitable tolling area where a plaintiff's mental illness actively interferes with their [sic] right to access their [sic] benefits." (Emphasis in original.)

8. On October 2, 2002, Mrs. Garcia's counsel wrote the Director of the Fund, asking that the decision be reconsidered because it rested on the inaccurate conclusion that Ms. Garcia did not become mentally disabled until February 10, 1997, the day she saw Dr. Morales for the first time. On October 23, 2002, the Fund's counsel wrote a reply stating that due to the inapplicability of equitable tolling under Section 8.1, "a rehearing on additional facts presented in your letter is a futile exercise." The letter did not include an explanation of what its author meant by the word "rehearing," although, in fact, Mrs. Garcia had not been offered even one hearing in which she, her daughters, her psychiatrist, or any other witnesses could offer testimony addressing the circumstances of her delayed filing.

9. Having exhausted the Fund's internal appeals procedures, on June 23, 2003, Ms. Garcia sued in the United States District Court for the Southern District of New York in an unsuccessful effort to obtain, inter alia, equitable relief pursuant to ERISA § 502(a)(3), 29 U.S.C. 1132 § (a)(3). Granting summary judgment for Respondents on June 7, 2004, the district court rejected Mrs. Garcia's request for the application of equitable tolling, as well as her alternative request for an evidentiary hearing to determine if the facts warranted its application. According to the court, equitable tolling was inappropriate because the time limitation used to reduce her benefits "is not a limitation period at all," but a "substantive rule." (Pet. App. A-19) 33 Employee Ben. Cas. (BNA) 2455,

2461 2004 U.S. Dist. LEXIS 25237, (S.D.N.Y. June 7, 2004).

10. On June 23, 2005, the United States Court of Appeals for the Second Circuit affirmed. The court endorsed the district court's refusal to provide an evidentiary hearing because, in the court's view, Mrs. Garcia's claim "was found to be timely," and was "merely seeking additional retroactive benefits." Ramos v 1199 Health Care Employee Pension Fund, 413 F.3d at 239. The court believed her situation to be essentially different from that faced by a mentally disabled claimant who, due to a late application, has been forced to forfeit all benefits. Equitable tolling, according to the court, might be appropriate to prevent such a complete forfeiture, but could never be an appropriate form of relief for an individual, such as Mrs. Garcia whose forfeiture was less than complete. *Id.* at 238.

11. The court ignored the argument that it was incumbent on the district court to develop and employ principles of federal common law to protect Mrs. Garcia's rights. In its view, the district court had correctly denied her any relief, even though the court of appeals conceded that, in endorsing the district court's refusal to grant relief, it was aware that "some inequities may arise." *Id*.at 239. The court of appeals also ignored the substance of Mrs. Garcia's alternative argument that the Retirement Committee's decision could not survive even deferential review. Instead, it declared, without explanation, that the Fund's decision as to the "amount of benefits" to award as well as its "plain reading" of the plan should be "afforded deference" and not be deemed "arbitrary and capricious." *Id.*

12. On July 7, 2005, Mrs. Garcia timely sought rehearing en banc, which the Second Circuit denied on August 18, 2005. This petition followed.

REASONS FOR ISSUING THE WRIT

The circular logic that is the basis of the reduction of Mrs. Garcia's benefit,[2] along with the absence of a remedy at law, the inherently equitable nature of the relief she seeks, and the clarity of decisions below, provide this court with a particularly good opportunity to address an aspect of "other appropriate equitable relief" it was not required to address in Knudson: the degree to which Congress expected district courts to grant such relief to a plan participant who, as a consequence of the application of a facially valid plan provision, has suffered an injustice.

Resolution of this question is particularly urgent in light of the inconsistent answers implicit in the decisions of different courts. The Second Circuit's decision is representative of those courts that have insisted on the literal application of plan documents and restrictive

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[2] Stripped to its essence, the application of Plan Section 8.1 without tolling has created this situation: Mrs. Garcia's claim for a disability pension is based on her mental impairment. Therefore to be eligible for a full retroactive award she had to be mentally impaired throughout the retroactive period, but because, in fact, she was mentally impaired throughout the retroactive period she delayed in making her application and therefore cannot receive a full retroactive award. Cf. Joseph Heller, Catch-22 ch. 5 (1955)(describing fictional military rule exempting insane soldiers from flying dangerous missions but which only allows such soldiers to take advantage of exemption if they ask for it, an action that is deemed to prove that they are sane).

interpretation of the courts' power to grant "other appropriate equitable relief" under Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3). By contrast, other courts, attempting to further the goals of ERISA's framers, have shown their readiness to abandon a literal reading of plan documents, where to do so would be unjust, contrary to the purpose for which the plan was created, or inconsistent with ERISA's remedial mission. To that end, courts have made use of the broad equitable powers which the statute has given them, and have tried to fulfill Congress's expectation that they would develop a body of federal common law to protect those for whose protection ERISA was enacted. The need for this Court's intervention is underlined by ERISA's ambitious remedial mission and its powerful effect on the economy and public welfare.

Finally, this case provides an excellent vehicle for the Court to resolve the conflicting responses of the courts as to the applicability of equitable tolling to situations in which, absent equitable tolling, a claimant will forfeit part of an award because of the lateness of the claimant's application when the lateness is a consequence of uncontrollable or unforeseen circumstances.

I. A DECISION BY THIS COURT IS NEEDED TO RESOLVE A FUNDAMENTAL INCONSISTENCY AMONG THE FEDERAL COURTS WITH RESPECT TO THE DEVELOPMENT OF FEDERAL COMMON LAW AND THE APPLICATION OF EQUITABLE RELIEF IN SUITS CHALLENGING THE DENIAL OF BENEFITS BY ERISA-QUALIFIED PENSION PLANS

The facts of this case present in unusually stark form the recurring problem of a person forced to lose a benefit because of a failure "to do something that the disability

prevents him from doing," creating what "some would refer to as a 'catch-22' situation." Clarke v. Unum Life Ins. Co., 14 F. Supp. 2d 1351, 1355 (S.D. Ga. 1998)) (quoting Seabra Life Ins. Co. v. Puritan Life Ins. Co., 369 A.2d 652, 656 (R.I. 1977)) (citing Magill v. Travelers Ins. Co., 133 F.2d 709 (8th Cir. 1943)). In more general terms, these facts are representative of the many cases in which a district court, based upon a literal reading of plan documents and a constricted view of the court's own equitable powers, has rendered a decision whose consequences are obviously unjust and inconsistent with the purposes of the statute. They are also representative of one of two powerful but competing general approaches to ERISA jurisprudence. This conflict has not taken the form of a division among the circuits—although on some issues it does approximate such a division—but rather an irregular range of approaches that cuts across circuit lines.

Undoubtedly this inconsistency is, at least, in part, due to the language used in ERISA's enforcement provisions, which evince their derivation from both trust and contract law, a duality which has led courts to adopt the principle that, "in examining benefit denials under ERISA plans, and in interpreting such plans, a court should employ both trust and contract principles." Allen v. Adage, 967 F.2d. 695, 696 (1st Cir.1992) (citations omitted). In practice, this has led "circuit courts [to] flip flop between contract law and trust law in their treatment of employee benefit plans." George L. Flint, ERISA: Fumbling the Limitations Period, 84 Neb. L. Rev. 313, 346 (2005) (citations omitted).

More fundamentally these inconsistencies can be traced to the fact that

> ERISA is a hybrid. It is protective labor legislation that imposes minimal standards on employee benefit

> plans and provides enforcement power to the Department of Labor to protect employees. It is also a tax scheme that attempts to provide incentives to employers to maintain plans and to prevent the abuse of tax incentives. Because private pension plans represent the largest pool of investment capital in the United States, ERISA's function as protective labor legislation is tangled up with its function as a device to regulate capital formation and financial intermediaries. ERISA is administered by both the Treasury Department and the Department of Labor, a division of function which reflects the fact that, historically, private pension policy was entirely a matter of tax incentives until the [Welfare and Pension Plan Disclosure Act] gave the Labor Department a limited oversight role in 1958. Since the legitimacy of the tax breaks demanded some protection of employee pension expectations, Congress and the Treasury conditioned the tax preferences on compliance with requirements designed to protect employees' expectations in receiving pensions. This hybrid structure led not only to serious problems of bureaucratic disorganization but also to a schizophrenia of purpose. This confusion profoundly affects what courts say about what Congress intended in enacting it. Therefore in the many instances in which the statute is ambiguous or silent, the intention of the statute is equally inscrutable. This creates serious interpretive problems for courts.
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> Catherine L. Fisk, Lochner Redux: The Renaissance of Laissez-Faire Contract in the Federal Common Law of Employee Benefits, 56 Ohio St. L.J. 153, 162-3 (1995) (citations omitted).

In the current of decisional law exemplified by the instant case, ERISA is seen less as a regulatory scheme devised to protect participants and beneficiaries than a charter of rights for plans and their sponsors. Accordingly, these courts have emphasized those aspects of the statute that are consistent with this perspective: the insulation its preemption provisions provide plans from suits and regulation under state law; the limitation of plan liability to contractual damages, see DiFilice v. Aetna U.S. HealthCare, 346 F.3d 442,453-67 (3d Cir. 2003) (Becker, C.J., concurring); and the freedom of employers not to create a plan and if they do create a plan their freedom, within very broad limits, to set its terms, including the freedom to limit the liability of plan fiduciaries by granting them discretionary authority.

In issuing decisions in this mode, courts have given literal effect to plan provisions as if they were the product of arms-length negotiations, applying their terms literally without regard to the anomalous or unfair consequences that may result. This approach is exemplified by an influential decision in which a court held that by simply inserting certain boilerplate language a plan could shield its benefit denials from any but the most deferential level of judicial review, Herzberger v. Standard Life Ins. Co., 205 F.3d 327 (7th Cir. 2000) (Posner, C.J.), and by the same court's insistence that, by inserting this boilerplate language, even plans with an obvious conflict of interest can enjoy the same deference unless the claimant somehow manages to find specific evidence that the conflict affected the decision. Mers v. Marriot Int'l Group Accidental Death & Dismemberment Plan, 144 F.3d 1014 (7th Cir. 1998). And it is exemplified by courts that have refused to consider extrinsic evidence or apply equitable doctrines to defeat plan amendments terminating the health benefits of

thousands of retirees, see e.g., Grain Millers v. International MultiFoods Corp., 116 F.3d 976 (2d Cir. 1997); Joyce v. Curtiss-Wright, 992 F. Supp. 259 (W.D.N.Y. 1997), aff'd, 171 F.3d 130 (2d Cir. 1999), and by a decision that allowed a plan to reduce drastically the insurance coverage of an employee who had already been diagnosed with AIDS, McGann v. H & H Music Co., 946 F.2d 401 (5th Cir. 1992). See also Farley v. Benefit Trust Co., 979 F.2d 653, 659 (8th Cir. 1992); Awbrey v. Penzoil Co., 961 F.2d 928, 930 (10th Cir. 1992) (refusing to consider extrinsic evidence of plan's meaning); Confer v. Custom Eng'g, 952 F.2d 41, 43 (3d Cir. 1991).

Other courts have taken a different approach, recognizing the unique character of ERISA and taking notice of the problems it was designed to remedy. Acknowledging the obvious fact that an employee benefit plan is rarely the embodiment of an authentic meeting of minds, these courts have been less inclined to see a plan as a voluntary agreement than as an "express trust–the highest known to the law." Nicolaou v. Horizon Media, Inc., 402 F.3d 325, 330 (2d Cir. 2005) (Pooler, C.J., concurring) (quoting Donovan v. Bierwirth, 680 F.2d 263, 272 n.8 (2d Cir. 1982)). They have also implicitly given a broad construction to the requirement that fiduciaries act in accordance with plan documents "insofar as such documents and instruments are consistent with [ERISA's other requirements]." 29 U.S.C. § 1104(a)(D). These courts have construed this phrase as forbidding a fiduciary from applying even a facially valid plan provision when doing so would be inconsistent with the statute's purposes. Using this approach, courts have refused to allow widows and widowers to receive survivors' pensions when their violent actions were the cause of their spouses' deaths. Administrative Comm. of the H.E.B. Inv. & Ret. Plan v.

Harris, 217 F. Supp. 2d 759, 761 (E. Tex. 2002) (invoking court's view that "Congress could not have intended" the result otherwise dictated by statute's text); Addison v. Metropolitan Life Ins Co., 5 F. Supp. 2d 392, 393 (W.D.Va. 1998) (invoking "federal common law and general policy considerations"). Likewise, courts have refused to permit disability plans to be administered in accordance with the literal language of their eligibility definitions when these definitions have been found to be overly restrictive. Helms v. Monsanto Co., 728 F.2d 1416 (11th Cir. 1984) (refusing to apply express terms of disability plan); accord Saffle v. Sierra Pac. Power Co. Bargaining Unit Long Term Disability Income Plan, 85 F.2d 455 (9th Cir. 1996); Torix v. Ball Corp. of Ind., 862 F.2d 1428 (10th Cir. 1988). See Gaines v. The Sargent Fletcher, Inc. Group Life Ins. Plan, 329 F. Supp. 2d 1198, 1217-1222 (C.D. Cal. 2004) (applying federal common law doctrines of reasonable expectations and impossibility in rejecting Plan's contention that participant was "not entitled to the full benefits for which he paid because he neglected to satisfy a prerequisite of coverage of which he was not made aware . . ."); Moore v. Blue Cross & Blue Shield of the Nat'l Capital Area, 70 F. Supp. 2d 9, 26-27 (D.D.C. 1999) (applying federal common law to estop a health maintenance plan from applying its terms to deny coverage). Cf. Brown v. Blue Cross & Blue Shield of Ala., 898 F.2d 1566 (11th Cir. 1990) (using common law trust principles to set higher standard of review of trustees' decision even though plan gave them discretionary authority). See also Central States, S.E. & S.W. Areas Pension Fund v. Central Transp., Inc., 472 U.S. 559, 568 (1985) ("trust documents cannot excuse trustees from their duties under ERISA"); Laborers Nat'l Pension Fund v. Northern Trust Quantitative Advisors, Inc., 173 F.3d 313,

322 (5th Cir. 1999) (investment manager may not follow plan if investing in plan assets would violate its duty of prudence); Herman v. Nations Bank, 126 F.3d 1354, 1369 (11th Cir. 1997) (construing duty of fiduciary to follow plan documents "insofar as such documents are consistent with [ERISA]" to include duty not to follow a facially valid plan provision when its application would be inconsistent with ERISA); Kuper v. Iovenko, 66 F.3d 1447, 1457 (6th Cir. 1995); Moench v. Robertson, 62 F.3d 553 (3d Cir. 1995); Fink v. Nat'l Savings Bank & Trust Co., 772 F.2d 951, 955-56 (D.C. Cir. 1985) (ERISA's prudence and loyalty requirement apply to all investment decisions, including those made by plans that may invest 100% of their assets in employer stock); Eaves v. Penn, 587 F.2d 453, 459-60 (10th Cir. 1978); In re WorldCom, Inc., 263 F. Supp. 2d 746, 764 (S.D.N.Y. 2003); In re Williams Co. ERISA Litig., 271 F. Supp. 2d 1328, 1343 (N.D. Okla. 2003); Rankin v. Rots, 278 F. Supp. 2d 853, 857 (E.D.N.Y. 2003); In re Enron Corp. Sec. Derivative & ERISA Litig., 284 F. Supp. 2d 511, 549 n.51, 676-77 (S.D.Tex. 2003) (holding that application under certain circumstances of facially valid plan provision may violate fiduciary duty); Ershick v. Greb X-Ray Co., 705 F. Supp. 1482, 1486-87 (D.Kan. 1989).

The two different approaches are revealed in especially clear form in the majority and dissenting opinions in Smith v. The Hartford Insurance Group, 6 F.3d 131 (3d Cir. 1993). The case concerned the appeal of a woman who due to a stroke had stopped working and been hospitalized indefinitely in a comatose condition. Her eligibility for appropriate medical coverage was conditioned on both her applying within thirty days of leaving her company's "employ" and on her company not changing coverage to that of "another organization." The

district court found that neither condition had been fulfilled: she did not apply until some fifteen months after she had stopped working and the company had converted coverage to a self-insured voluntary plan. Reversing the district court's grant of summary judgment, the majority held that the words "employ" and "another organization," were ambiguous and that facts might be shown entitling her to relief on a theory of equitable estoppel. Judge Hutchinson dissented, based, inter alia, on his view that no rational finder of fact could have found the comatose claimant to have remained for such a long period in the company's "employ." Nonetheless, in appreciation of the majority's concerns, Judge Hutchinson was "unable to close this dissent," without indicating that he regretted the result, which created a "feeling of unfairness" that was "palpable." Indeed, he hoped it was "not . . . beyond the powers of the courts and Congress to dispel that sense of injustice despite the limitations ERISA puts on the techniques the common law would employ to adjust rigid rules to particular situations. Logic may be the law's tool but its heart is justice, and the public's demand for concrete justice will not be contained by the straitjacket of inflexible rules." *Id.* at 146.

II. THIS CASE PROVIDES A PARTICULARLY GOOD VEHICLE FOR THIS COURT TO DELINEATE WHEN AND HOW FEDERAL COMMON LAW MAY BE USED TO PROVIDE "OTHER EQUITABLE RELIEF" UNDER ERISA § 502(A)(3

In Great-West Life Annuity Insurance Co. v. Knudson, 534 U.S. 204 (2002) ("Knudson"), this Court emphatically reaffirmed its view that the "term 'equitable relief' in § 502(a)(3) must refer to 'those categories of

relief that were typically available in equity . . . ." *Id.* at 219 (quoting Mertens v. Hewitt Associates, 508 U.S. 248, 256 (1993)). In Knudson, as in the majority of cases that have relied on it, the case's application has had the effect of withholding relief from parties whose claims were found to be legal rather than equitable in nature. The instant case presents a different problem: that of a plaintiff who has invoked Section 502(a)(3), 29 U.S.C. § 1132(a)(3), in an effort to obtain a form of relief–equitable tolling—whose equitable character is undisputed. The rejection of Mrs. Garcia's suit was not based on a finding that she was using section 502(a)(3) to obtain a form of relief traditionally recognized by the common law courts, but on the finding that, despite its equitable nature, the doctrine of equitable tolling could not be applied to a claim that was "merely seeking additional retroactive benefits." Garcia Ramos at 239. Tacitly acknowledging the absence of a remedy at law, the Court stated that "[w]hile we do not discount that some inequities may arise from the Plan's determination of the amount of benefits to which the claimant is entitled, equitable tolling is not the vehicle for remedying such inequities on these facts." *Id.*

This decision expressed a flawed understanding of the nature of the "other equitable relief" available under Section 502(a)(3). Although this Court has been unequivocal in holding that this provision may not be used as a vehicle for obtaining forms of relief historically considered subject to the jurisdiction of the common law courts, this Court has never suggested that a court may not develop federal common law to "extend" the doctrine of equitable tolling when failing to do so would be inequitable and inconsistent with the statute's purposes.

When Congress used the term "other appropriate equitable relief" it was doing more than placing common

law remedies out of the reach of participants, beneficiaries, and fiduciaries. Congress was simultaneously placing within their grasp a potent category of relief it had already used in numerous other remedial statutes. Knudson, 534 U.S. at 217 and 217 n.3. Congress certainly expected that, in Justice Frankfurter's words, in interpreting a statute enacted for "[t]he attainment of a great national policy" a court "must not be confined within narrow canons of equitable relief deemed suitable by chancellors in ordinary private controversies." Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 177, 188 (1941). Indeed, even when not effectuating a great national purpose, Congress was undoubtedly aware that, as no lesser authority than John Norton Pomeroy, has observed:

> The true function of [chancery] precedents is that of illustrating principles . . . . But . . . the chancellor always has had, and always must have, a certain power and freedom not possessed by the courts of law, of adapting the doctrines which he administers. He can extend those doctrines to new relations and shape his remedies to new circumstances in which a court of law in analogous cases would be powerless to give any relief. In fact, there is no limit to the various forms and kinds of specific remedy which he may grant, adapted to novel conditions of right and obligation that are constantly arising from the movements of society. While it must be admitted that the broad and fruitful principles of equity have been established, and cannot be changed by any judicial action, still it should never be forgotten that these principles, based as they are on Divine morality, possess an inherent vitality and a capacity of expansion so as to ever meet the

want of a progressive civilization.

Bowen v. Hockley, 71 F.781, 786 (4th Cir. 1934) (quoting 1 John N. Pomeroy, On Equity Jurisprudence § 60 (4th ed 1918) (1883)).

A congressional expectation that the courts would apply equity expansively is revealed (i) in the remedial nature of ERISA, (ii) in the statute's enforcement scheme whose bedrock is an explicit extension of federal equity jurisdiction that gives participants "ready access to the Federal Courts," ERISA § 2(b), 29 U.S.C. § 1001(b), (iii) in a legislative history demonstrating that Congress's decision not to create a new administrative agency to adjudicate pension disputes was based on its expectation that the federal courts would be the principal guardians of the rights of participants and beneficiaries, see 2 Subcommittee on Labor of the Senate Committee on Public Labor and Public Welfare, 94th Cong. 2d Sess, Legislative History of the Employee Retirement Income Security Act of 1974, 1835-1836 (Comm.Print 1976),[3] and (iv) in a legislative history demonstrating that Congress "intended that a body of Federal substantive law [would] be developed" to fulfill this expectation and further the purposes of the statute." Massachusetts Mut. Life Ins. v. Russell, 473 U.S. 134, 156 (1985) (citing 120 Cong. Rec. 29442(1974) (Sen. Javits)).

These expectations were the logical counterpart to ERISA's sweeping preemption of remedies that would otherwise be available under state law. See ERISA § 29 U.S.C. § 1144. Absent the development of federal common law ERISA would have the unintended effect of

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[3] Because ERISA-qualified plans are not governmental agencies, neither their interpretations nor adjudications are entitled to deference under Chevron - U.S.A. Inc. v. Natural Resource Council, Inc., 467 U.S. 694 (1984).

leaving employees and their beneficiaries– the very persons for whose benefit ERISA was enacted– with even fewer rights and remedies than they had prior to its enactment. See DiFilice, 346 F.3d at 453-67. Moreover, because, unlike commercial contracts, the summary plan descriptions that are distributed to participants are to be written so as "to be understood by the average plan participant," ERISA § 102(a)(1), 29 U.S. 1022(a)(1), courts have recognized the need to develop federal common law to fill in plan documents to the extent they do not address or anticipate certain eventualities. See Griggs v. E.I. Dupont De Nemours & Co., 385 F.3d 440, 453 (4th Cir. 2004) ("Dupont's claim that the proposed relief would impermissibly re-write its benefits plan is without merit. Neither ERISA nor the benefit plan addresses a participant's right to rescission based on DuPont's breach of fiduciary duty. It is thus entirely proper for us to develop federal common law to fill in these gaps.")

Notwithstanding this congressional expectation, as the court of appeals' decision in the instant case reveals, nothing less than a decision by this Court can ensure that Section 502(a)(3) is a bridge, rather than a barrier, to equitable relief.

III. THE PUBLIC HAS A COMPELLING INTEREST IN THE FAIR ADMINISTRATION OF ERISA-REGULATED BENEFIT PLANS

The need for this Court to address this issue is underlined by ERISA's remedial purposes and by its pervasive influence on national life. Congress enacted ERISA well aware that it would have far-reaching effects, expecting it to serve, along with the Social Security Act, as one of two great bulwarks against the impoverishment of

those whose incomes have been reduced by the advent of old age, disability, or death of a spouse. However, in enacting ERISA, Congress–in contrast to the scheme it created with the Social Security Act– did not delegate ERISA's direction to a newly created administrative agency or raise its funds by taxing employers. Instead, Congress looked to the private sector to create and fund pension and other employee benefit plans, and expected them to be administered by the private sector (or by the private sector in collaboration with trade unions in the case of plans created under the Taft-Hartly Act). Although not less concerned with the protection of private pension benefits than it had been with Social Security benefits, Congress assigned their protection not, in the first instance, to the government but to the plans themselves. At the center of this dispersed delegation of authority was the statute's mandate that those who make decisions affecting participants and beneficiaries exercise their authority in a manner consistent with their role as fiduciaries with undivided loyalty to their interests. 29 U.S.C. § 1104(a)(1)(A). Along with this fiduciary role, ERISA sets forth numerous specific requirements designed for the protection of participants and beneficiaries including, inter alia, notice requirements, 29 U.S.C. §§ 1021-1030, the requirement that their claims receive a "full and fair review," 29 U.S.C. § 1133, and causes of action intended to provide them with "ready access to the Federal Courts," See 29 U.S.C. § 1001(b).

In exchange for meeting these standards, Congress, at considerable public expense, has indirectly subsidized participating employers by exempting from taxation their pension contributions, along with their earnings, until the benefits are actually distributed, usually at a distant future date. 26 U.S.C. §§ 401(a), 501(a). Moreover, as already

noted, because of ERISA's sweeping preemption provisions, qualified plans and their sponsors enjoy the incalculable advantage of almost complete exemption from state regulation and suits brought under state law. 29 U.S.C. § 1144, while the remedies available under ERISA itself are limited to equitable relief and contractual damages. See DiFilice, supra, 346 F.3d at 453-67 (Becker, C.J., concurring).

The effects of the statute are considerable. Sixty percent of the American workforce participates in at least one ERISA regulated benefit plan—some 835,512,000 employees. Bureau of Labor Statistics, National Compensation Survey: Employee Benefits in Private Industry in the United States, Tables 1 and 9 (2005). This number refers only to actual participants; when one takes into account their beneficiaries and dependents, the number of individuals affected by ERISA is obviously much larger. This is without regard to the indirect but significant role such plans play in the national economy by, along with Social Security, increasing the level of consumption of retired and disabled workers and the elderly surviving spouses who are the principal recipients of its benefits, as well as the access it provides to employees and their families to medical treatment from ERISA-regulated health plans. Nor does it take account of the importance of such plans to the national economy, their approximately $4 trillion in assets representing America's single largest pool of investment capital. Examining Pension Security and Defined Benefit Plans: Joint Hearings Before the Subcommittee on Employer-Employee Relations of the House Committee on Education and the Workforce and the Subcommittee on Select Revenue Measures of the House Committee on Ways and Means, 108th Cong., 1st Sess. 28 (2003) (testimony of Hon.

Ann L. Combs). Nor does it take into account the interest of tax payers in ensuring that the trustees of the plans they so generously subsidize are not given the "discretion" to evade well-established standards of equity and fairness.[4]

IV. A DECISION OF THIS COURT IS NEEDED TO RESOLVE UNCERTAINTY ABOUT THE CIRCUMSTANCES IN WHICH EQUITABLE TOLLING IS AVAILABLE TO TOLL TIME LIMITS SET FORTH IN ERISA PLAN DOCUMENTS AND FEDERAL STATUTES

In explaining its reason for treating the partial forfeiture of Mrs. Garcia's benefits differently than the complete forfeiture suffered by other claimants, the court below cited Andrews v. Principi, 353 F.3d 1134, 1137-38 (Fed. Cir. 2003), in which tolling was held to be unavailable to mitigate the reduced retroactive award of a veteran's disability compensation. In reaching this decision, the Federal Circuit implicitly took a position that was inconsistent with that of the Ninth Circuit in Brockamp v. United States, 67 F.3d 260 (9th Cir. 1995), concerning the applicability of equitable tolling to applications for refunds of tax overpayments under Section 6511 of the Internal Revenue Code. Under Section 6511, refunds are only granted for the three years immediately

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[4] The loss of revenue, for example, in 2003 due to tax exemptions enjoyed by retirement and health plans, respectively, is estimated at $279.1 billion and $569.9 billion. The estimated projection for 2004 is $360 billion and $618.3 billion. Majority Staff of the House Comm. on Ways and Means, 108th Cong. 2d Sess., Background Material on Data on the Programs Within the Jurisdiction of the Committee on Ways and Means Table 13-4 (Comm. Print 2004).

preceding the refund application, if tax returns were filed for the relevant years, or for the two years immediately preceding the application if tax returns were not filed. 26 U.S.C. § 6511(a). The statute is therefore analogous to Plan Section 8.1 in that, under Section 6511, a person who made overpayments over the course of several years would only forfeit those monies that had been paid prior to the applicable time limitation. In Brockamp, an estate's administrator challenged the government's refusal to refund tax monies that the decedent had overpaid prior to the statutory deadline while he was impaired by senility. The district court rejected the administrator's argument that the time limit should be tolled, holding that the doctrine was not applicable to a statute that it believed Congress had intended to set as an absolute limit, a position analogous to that taken by the court below with respect to the time limit at issue in the instant case. In reversing, the Ninth Circuit opined that there was no evidence that Congress had intended that equitable tolling not be applicable to Section 6511. The court, moreover, believed, "it would be unconscionable to allow the government to retain money that it concedes it was not owed, and may have only received due to a 98-year old man's senility." 67 F.3d at 823.

This Court reversed. Although the Court observed that equitable tolling of "substantive limitations on the amount of recovery" was "a kind of tolling for which we have found no direct precedent," it refrained from making any general pronouncements about the "substance-procedure" distinction. Nor did it express disagreement with the circuit court's conclusion that it was inequitable for a party to retain money it conceded it had not been owed. Instead, the Court based its holding on "Section 6511's detail, its technical language, its iteration of the

limitations of both procedural and substantive forms, and the explicit listing of exception," which indicated that "Congress did not intend courts to read other unmentioned exceptions into the statute." 519 U.S. 347, 352 (1997). Needless to say, these are not characteristics of Section 8.1 of the Plan.

Brockamp was not the only instance in which this Court left unresolved the scope of equitable tolling. In Greyhound Corp. v. Mt. Hood Stages, 427 U.S. 322 (1978), this Court remanded a case to the Ninth Circuit to determine, inter alia, whether, although there was no statutory tolling of the statute of limitations under the Clayton Act, there might be equitable tolling. In his concurring opinion, Chief Justice Burger noted that, on remand, the Court of Appeals might apply traditional equitable principles in reaching its decision, and further observed that "the authority of a federal court, sitting as chancellor, to toll a statute of limitations is a well established part of its jurisprudence." *Id.* at 338 (citations omitted).

Moreover, other decisions of this Court have suggested that Andrews v. Principi was based on a flawed analysis. Thus, in Burnett v. New York Central Railroad Co., 380 U.S. 424, 427 n.2 (1965), this Court stated:

> While the embodiment of a limitation provision in the statute creating the right which it modifies might conceivably indicate a legislative intent that the right and limitation be applied together when the right is sued upon in a foreign forum, the fact that the right and limitation are written into the same statute does not indicate a legislative intent as to whether or when the statute of limitations should be tolled.

380 U.S. at 427 n.2. As this Court explained in

American Pipe & Construction Co v. Utah, 414 U.S. 538, 558 (1974), "the proper test is not whether a time limit is 'substantive' or 'procedural,' but whether tolling the statute of limitations in a given context is consonant with the legislative scheme."

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a writ of certiorari be issued to the United States Court of Appeals so that its decision in this case can be reviewed on its merits.

Dated: New York, New York
November , 2005

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

For The Second Circuit

August Term, 2004

(Argued: June 3, 2005 Decided: June 23, 2005)

Docket No. 04-3720-cv

MILMA GARCIA RAMOS,

Plaintiff-Appellant,

— v. —

1199 HEALTH CARE EMPLOYEES PENSION FUND

AND THE TRUSTEES OF THE 1199 HEALTH CARE EMPLOYEES PENSION FUND

Defendants-Appellees.

Before:

McLAUGHLIN, STRAUB, and HALL, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York (Richard M. Berman, *Judge*) entered June 9, 2004, upon a Decision and Order dated June 7, 2004, granting summary judgment to defendant-appellees' on plaintiff-appellant's claim of wrongful denial of disability benefits pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.* We affirm.

GARY STEVEN STONE, Legal Services for the Elderly, New York, NY, *for Plaintiff-Appellant.*

JEFFREY G. STEIN, General Counsel, 1199 Health Care Employees Pension Fund, New York, NY, *for Defendants-Appellees.*

STRAUB, Circuit Judge:

This appeal presents the issue of whether an ERISA plan beneficiary is entitled to an evidentiary hearing under *Chapman v. Choicecare Long Island Term Disability Plan*, 288 F.3d 506 (2d Cir. 2002), concerning whether equitable tolling allows her to receive an increased amount of retroactive benefits. Even assuming without deciding that equitable tolling applies to time limits that are specified in ERISA plan provisions, we hold that it does not apply where the provision at issue affects the retrospective period fo. which a beneficiary can claim benefits but does not set forth a limitations period that procedurally bars her claim. Because the relevant provision of the 1199 Health Care Employees

Pension Fund does not set forth such a limitations period, we affirm the judgment of the District Court.

BACKGROUND

Plaintiff-Appellant Milma Garcia Ramos ("plaintiff-appellant") was employed at St. Luke's Hospital, a contributing employer to the 1199 Health Care Employees Pension Fund (the "Fund" or "Plan") of which plaintiff-appellant is a qualified beneficiary. The Fund is an employee benefit pension plan within the meaning of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.* On March 9, 1996, plaintiff-appellant was injured after a fall that occurred on her job site at St. Luke's. Plaintiff-appellant ceased working in June 1996 and filed for and was awarded benefits from the Social Security Administration ("SSA"), which determined that she was "disabled according to [SSA] rules on June 10, 1996," and eligible for SSA benefits in December 1996.

On February 10, 1997, plaintiff-appellant sought treatment for depression and anxiety resulting from the physical trauma she endured from the accident. In a letter dated October 4, 2001, plaintiff-appellant's treating physician stated his opinion that since February 10, 1997, plaintiff-appellant has been "totally dysfunctional; her depression is so severe that she is not in good contact with reality; at times she is disoriented and does not know the month and year. She is also preoccupied with all kinds of somatic manifestations. Due to the above described psychopathology it is my opinion that [plaintiff-appellant's] ability to relate properly to her environment, to make proper decisions or to remember events is grossly impaired."

On July 26, 2001, plaintiff-appellant submitted an application for disability benefits to the Fund. On August 27, 2001, she was awarded benefits retroactive to August 1, 1999. On October 6, 2001, plaintiff-appellant's daughters appealed the decision, requesting that plaintiff-appellant be awarded benefits retroactive to December 1, 1996, the date she became eligible for SSA benefits, on the grounds that she was unable to file earlier because her health "hindered her from pro-actively coordinating her plans for a secure future." On December 18, 2001, the Fund denied the request, stating that the terms of the Plan limited benefits to the period of "two years prior to the date of filing the application with the Fund Office."

Section 8.1 of the Plan provides that "the payment commencement date of the Disability Pension Benefit shall be the first day of the month in which the payment of the Participant's Social Security disability benefits commence(d), but no earlier than two (2) years prior to the date of the filing of the application for the Disability Pension Benefit with the Fund Office." The Summary Plan Description reiterates this limitation of benefits. On June 6, 2002, through counsel, plaintiff-appellant requested reconsideration of this decision, maintaining that the doctrine of equitable tolling should be applied to her case because she "has a very significant mental disorder which precluded her from filing for disability benefits with the Fund." The Fund denied plaintiff-appellant's request for reconsideration on August 13, 2002, on the around that equitable tolling was inapplicable "because this rule is not a procedural rule akin to a statute of limitations (*i.e.*, an absolute bar to receiving benefits under the Plan), but a substantive rule governing the amount of benefits payable to a Plan

participant." The Fund also concluded that, even assuming that equitable tolling was applicable, plaintiff-appellant had failed to establish the requisite connection between her mental condition and the late filing in order to warrant application of equitable tolling. On October 2, 2002, plaintiff-appellant again requested reconsideration, which was denied on October 23, 2002.

On June 23, 2003, plaintiff-appellant commenced this action against the Fund and its Trustees. Defendants-appellees subsequently moved for summary judgment. On June 7, 2004, the District Court granted defendants-appellees' motion, finding that the Fund had reasonably interpreted the Plan provisions to limit benefits to the two years prior to the filing of the application for benefits and that the Fund's decision to deny plaintiff-appellant disability benefits for periods prior to August 1, 1999, was neither arbitrary nor capricious. The District Court noted that the Fund "persuasively" argued that, "the two year maximum retroactivity disability benefit rule . . . is not a limitation period at all. It is not an absolute bar to receiving benefits under the Plan. Rather, it is a substantive rule governing the amount of benefits payable to a Plan participant." The court also concluded that this Court's opinion in *Chapman v. Choicecare Long Island Term Disability Plan*, 288 F.3d 506 (2d Cir. 2002), did not apply because the Plan's terms explicitly provide for the limitation of benefits and because plaintiff-appellant was afforded a hearing and administrative review. Judgment was entered on June 9, 2004, and plaintiff-appellant filed a notice of appeal on July 1, 2004.

DISCUSSION

We review the District Court's grant of summary judgment *de novo*, "examining the evidence in the light most favorable to, and drawing all inferences in favor of, the non-movant." *IBM Corp. v. Liberty Mut. Fire Ins. Co.*, 303 F.3d 419, 423 (2d Cir. 2002). Summary judgment is appropriate only if it can be established "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

While plaintiff-appellant argues that the District Court improperly reviewed the Fund's decision under the "arbitrary and capricious" standard, and that her assertion of equitable tolling should be reviewed *de novo*, we, agree that the District Court applied the proper standard in analyzing the Fund's decision. The terms of the Plan confer on the administrator "discretionary authority to determine eligibility for benefits [and] to construe the terms of the plan." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989); *see also Pagan v. NYNEX Pension Plan*, 52 F.3d 438, 441 (2d Cir. 1995).

Plaintiff-appellant's principal argument on appeal is that she is entitled to an evidentiary hearing under *Chapman v. Choicecare Long Island Term Disability Plan*, 288 F.3d 506 (2d Cir. 2002), to determine whether she is entitled to equitable tolling in order to receive benefits going back to the date on which she became eligible for social security benefits. According to plaintiff-appellant, *Chapman* stands for the proposition that equitable tolling "must be read into any provision of an employee benefit plan under ERISA that

contains a time limit." We disagree and find *Chapman* distinguishable from the instant case.[1]

In *Chapman*, the plaintiff left her employment, claiming that she could no longer perform the duties of her employment because of a mental disability. 288 F.3d at 508. Almost two years later, she filed a claim for disability benefits under her employer's benefits plan. *Id.* The plan administrator denied the claim as untimely filed under a plan provision that indicated that a claim must be filed "no later than 90 days after the end of the elimination period" or "as soon [thereafter] as reasonably possible," which the plan administrator interpreted to mean no later than one year after the former deadline. *Id.* The plaintiff appealed this decision administratively. The plan administrator found that the appeal lacked merit and was untimely as it was not filed within sixty days of the decision. *Id.* at 508-09. The plaintiff then initiated suit in district court, arguing that the untimely filings were a product of her disabling mental condition and were, therefore, to be excused under the doctrine of equitable tolling. *Id.* at 509. The district court granted summary judgment to the defendant, and we vacated and remanded for further proceedings.

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[1] Though we accord deference to the Fund's interpretation of the Plan, the question of whether Section 8.1 sets forth a statute of limitations that is subject to equitable tolling is a question of law, rather than a question of mere plan interpretation, and therefore, we examine the issue *de novo*. *See, e.g., O'Neil v. Ret. Plan for Salaried Employees of RKO Gen., Inc.*, 37 F.3d 55, 62 (2d Cir. 1994).

We found that a question existed as to whether the plan was entitled to enforce the sixty-day time limitation concerning the administrative appeal insofar as it was not set out in either the policy or the summary plan description, and we remanded to the district court to make such a determination. *See id.* at 514-15. As to the further question of whether this time period could be tolled, we noted, without deciding (because the issue could become moot), that the plaintiff had made a showing sufficient to warrant an evidentiary hearing on the question of whether her mental illness impaired counsel's efforts to file a timely administrative appeal. *See id.* at 511-14. We found significant the plaintiff's attorneys, averment that their efforts were obstructed by the plaintiff's illness "because it caused them to be unsure of her wishes and to be doubtful of their authority to represent her in pursuing administrative review" and that they encountered "difficulty in getting authorization" from plaintiff to pursue the review and "difficulty ensuring the accuracy and completeness of information received from [plaintiff]." *Id.* at 512-13. We also found relevant the plethora of medical evidence describing the plaintiff as "severely depressed," "distrusting of most everyone's motives," sometimes "becom[ing] paralyzed with fear that leaves her either unable to think clearly or overcome by an intense, uncontrollable anger," "more or less out of control," "outrageous on the phone and totally unreachable," and having "difficulty focusing her attention and communicating her ideas in a clear and concise manner." *Id.* at 513 (internal citations and quotation marks omitted).

As we stated in *Chapman*, this Circuit "ha[s] never squarely held that [equitable tolling] applies to

time limits that are specified in [ERISA] plan provisions." *See id.* at 512. We shall not do so here. Even assuming that equitable tolling does apply in such a context, plaintiff-appellant is not seeking tolling of any *time limit*. She is not seeking relief from a limitations period or some other procedural provision that poses a complete bar to benefits or to review. Section 8.1 of the Plan does not set forth a statute of limitations, but, rather, provides for the "payment commencement date" of the disability pension benefit, designated as "the first day of the month in which the payment of the Participant's Social Security disability benefits commence(d), but no earlier than two (2) years prior to the date of the filing of the application for the Disability Pension Benefit with the Fund Office." Accordingly, Section 8.1 is not subject to traditional principles of equitable tolling. *See Andrews v. Principi*, 351 F.3d 1134, 1137-38 (Fed. Cir. 2003) (holding that statute establishing effective date for payment of veteran benefits was not a statute of limitations subject to equitable tolling); *see also Veltri v. Building Serv. 32B-J Pension Fund*, 393 F.3d 318, 322 (2d Cir. 2004) ("Equitable tolling is an extraordinary measure that applies only when plaintiff is *prevented from filing* despite exercising that level of diligence which could reasonably be expected in the circumstances." (emphasis added)). In *Chapman* and the related cases cited by plaintiff-appellant, the applicants were prevented from filing claims or obtaining review of an administrator's decision. *See Chapman*, 288 F.3d at 514, *Brown v. Parkchester S. Condos.*, 287 F.3d 58, 60-61 (2d Cir. 2002) (remanding for evidentiary hearing to determine whether equitable tolling of period in which to file Title VII claim was warranted in light of plaintiff s mental

condition), *Boos v. Runyon*, 201 F.3d 178, 184 (2d Cir. 2000) (holding that forty-five day period for seeking EEO counseling is subject to equitable tolling based on mental illness); *Canales v. Sullivan*, 936 F.2d 755, 756-59 (2d Cir. 1991) (holding that sixty-day statute of limitations in 42 U.S.C. § 405(g) may be equitably tolled based on a plaintiff's mental impairment). That did not occur here. Plaintiff-appellant's claim was found to be timely, benefits were awarded, and she was afforded review of the administrator's decision. She is merely seeking additional retroactive benefits. While we do not discount that some inequities may arise from the Plan's determination of the amount of benefits to which a claimant is entitled, equitable tolling is not the vehicle for remedying such inequities on these facts. Furthermore, the decision of the Plan administrator as to the amount of benefits to which plaintiff-appellant was entitled, as well as its plain reading of Section 8.1 as providing that benefits may not be awarded retroactively beyond the two years preceding the filing of an application for benefits, are afforded deference, *see Pagan*, 52 F.3d at 442-43, and we agree with the District Court that the Plan's decision that plaintiff-appellant was entitled to only two years of retroactive benefits was not arbitrary and capricious.

For the foregoing reasons the judgment of the District Court is hereby AFFIRMED.

CERTIFICATE OF SERVICE

I hereby state under penalty of perjury that four copies of the foregoing Reply Brief for Plaintiff-Appellant Milma Garcia-Ramos were served on the following counsel for Appellees, at the address provided for that purpose, by hand delivery on the 7th of July, 2005:

Jeffery G. Stein, Esq.
General Counsel
The Trustees of
The 1199 Health Care Employees Pension Fund
330 West 42nd Street, 31st Floor
New York, NY 10036

Dated: New York, New York
July 7, 2005

Barry L. Salkin, Esq. (BS-8880)

BEST AVAILABLE COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MILMA GARCIA RAMOS,	:	
	:	
Plaintiff,	:	03 Civ. 4527 (RMB)(HBI
	:	
- against -	:	**DECISION AND ORDE**
	:	
1199 HEALTH CARE EMPLOYEES PENSION FUND and THE TRUSTEES OF THE 1199 HEALTHCARE EMPLOYEES PENSION FUND,	:	
	:	
Defendants.	:	

I. Introduction

On June 23, 2003, Milma Garcia Ramos ("Plaintiff") filed a complaint ("Complaint"), pursuant to the Employee Retirement Income Security Act, 29 U.S.C. § 2001, *et seq.* ("ERISA"), seeking thirty-two additional months of pension disability benefits from the 1199 Healthcare Employees Pension Fund ("Fund") and the Trustees of the Fund. Complaint at ¶¶ 18-30. That is, Plaintiff seeks retroactive benefits over and above the two years of retroactive benefits already awarded to her by the Fund as a result of an injury she suffered on

March 8, 1996 while employed at St. Luke's Hospital. Id. at ¶¶ 6, 13.[1]

Plaintiff filed an application for disability benefits with the Fund on July 26, 2001 ("Application Date"), more than five years after her injury. *Id.* at ¶ 12. The Fund awarded her retroactive disability benefits for two years prior to the Application Date, *i.e.*, from August 1, 1999 ("Award Date"), citing Section 8.1 of the Fund's Official Plan Document ("Plan"), which states that the commencement of disability payments shall be "no earlier than two (2) years prior to the date of filing of the application for the Disability Pension Benefit . . . ." Plan at 93, Section 8.1 ("Section 8.l"). Plaintiff here seeks benefits from December 1, 1996 to August 1, 1999. ("Pre-Award Benefits"). Id. at ¶¶ 13, 19.2

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[1] The Complaint appears to misstate the actual date of Plaintiff's injury as March 9, 1996. Complaint at ¶ 6. See, e.g., Plaintiff's Application for Disability Pension Benefit, dated 7/26/01 at 2; Report of Dr. Hugo M. Morales at 1 (attached to Defendants' Memorandum in Support of Motion for Summary Judgment at Exh. D); Plaintiff's Memorandum in Opposition to Motion for Summary Judgment at 3.

[2] There is some confusion as to whether the month of December 1996 is included in Plaintiff's demand for disability benefits. A letter from Plaintiff's counsel to the Fund states that her "disability benefit should be recomputed to take into account disability benefits from January 1, 1997." Letter from Barry L. Salkin to 1199 Fund of 6/6/02, at 2 (attached to Complaint at Exh. 4); see also Defs.' Rule 56.1 Statement at ¶ 18. In the Complaint, however, Plaintiff requests benefits from December 1, 1996 to August 1, 1999. Complaint at ¶¶ 13, 19. Similarly, Plaintiff's Memorandum in Opposition

On January 29, 2004, Defendants filed a Motion for Summary Judgment as well as a Memorandum of Law in Support of Motion for Summary Judgment ("Defs.' Mem."). Plaintiff filed a Memorandum in Opposition to Motion for Summary Judgment ("Pl.'s Mem.") on March 5, 2004. Defendants did not submit reply papers. For the reasons set forth below, Defendants' Motion for Summary Judgment is granted.

II. Background

From January 1982 to June 1998, Plaintiff was employed at St. Luke's Hospital ("Hospital"), a contributing employer to the Fund. Complaint at ¶¶ 4, 6; Defendants' Rule 56.1 Statement ("Defs.' R. 56.1") at ¶ 2. Plaintiff is a qualified beneficiary of the Fund. Complaint at ¶ 4. The Fund is an employee benefit pension plan administered pursuant to ERISA, 29 U.S.C. § 1001, *et seq.* Complaint at ¶ 5; Defs.' R. 56.1 at ¶ 4. The Fund is financed with contributions from employers pursuant to collective bargaining agreements with various unions, and it is administered by a Board of Trustees "for the purpose of providing pension and disability benefits to covered employees in accordance with a written Plan Document and a Summary Plan Description." Defs.' Mem. at 10.

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states that "[b]ecause the award of disability benefits to Plaintiff was not made retroactive to December 1996, the first month of her [SSA] entitlement, [the Fund] did not compensate Plaintiff for at least 32 months of her disability." Plaintiff's Memorandum in Opposition to Motion for Summary Judgment at 4.

On March 8, 1996, Plaintiff was injured when she fell at the Hospital. Complaint at ¶ 6. "[Plaintiff] was forced to cease working [in June 1996] as a result of the injuries she suffered on [March 8, 1996] at her job site." Id. Plaintiff subsequently filed for Social Security Administration ("SSA") benefits and the SSA determined that she was "disabled according to [SSA] rules on June 10, 1996." Notice of SSA Award, dated 10/22/97, at 2 (attached to Complaint at Exh. 1). Due to an SSA rule that a beneficiary must "be disabled for 5 full calendar months in a row before [becoming] entitled to benefits," Plaintiff became eligible for SSA benefits on December 1, 1996. Id.

After the injury, "as a result of her trauma, Plaintiff became severely depressed." Complaint at ¶ 8. At the suggestion of Dr. Paul Hoboica, the physician who treated her physical injuries, the Plaintiff sought treatment for her depression and anxiety with Dr. Hugo M. Morales, a psychiatrist, on February 10, 1997. Complaint at ¶ 8; Pl.'s Mem. at 3. In a letter dated October 4, 2001, Dr. Morales described Plaintiff's mental state as follows: "It is my professional opinion that since February 10, 1997, up to the present date, [Plaintiff] is totally dysfunctional; her depression is so severe that she is not in good contact with reality; at times she is disoriented, and does not know the month and year. She is also preoccupied with all kinds of somatic manifestations. Due to the above described psychopathology it is my opinion that [Plaintiff's] ability to relate properly to her environment, to make proper decisions or to remember events is grossly impaired." Letter from Dr. Hugo M. Morales of 10/4/01, at 1 (referring to Report of 2/27/97; both attached to Complaint at Exh. 8) ("Pl.'s Exh. 8").

On July 26, 2001, more than four years after seeking psychiatric treatment with Dr. Morales and more than five years after her injury, Plaintiff filed her "Application for Disability Pension Benefits" with the Fund. Application at 1 (attached to Defs.' Mem. at Exh. A); Complaint at ¶ 12. Section 8.1 of the Plan provides that "the payment commencement date of the Disability Pension Benefit shall be the first day of the month in which the payment of the Participant's Social Security disability benefits commence(d), **but no earlier than two (2) years prior to the date of filing of the application for the Disability Pension Benefit with the Fund Office."** See Plan at 93, Section 8.1 (January 2000) (attached to Defs.' Mem. at Exh. K) (emphasis added).

The Summary Plan Description ("SPD"), which accompanies and explains the Plan, states that "[a] Disability Pension Benefit is not automatic. You need to apply for this benefit with the Pension Fund . . . Your Disability Pension Benefit will usually start as of the effective date of your Social Security Disability payments. But you cannot receive a Disability Pension Benefit until after the period that you're eligible for weekly disability benefits from the 1199 National Benefit Fund. **Retroactive benefits are not paid for any time earlier than two years before you filed your application for Disability Pension Benefits with the Pension Fund.**" SPD at 33 (attached to Defs.' Mem at Exh. H) (emphasis added).[3] In Plaintiff's case, because

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[3] Summary plan descriptions generally take precedence over the technical text of official plans. Heidgerd v. Olin Corp., 906 F.2d 903, 907-08 (2d Cir. 1990) ("To allow the Plan to contain different terms that supersede the terms of the

she applied for pension disability benefits on July 26, 2001, Section 8.1 had the effect of limiting her benefits retroactively to August 1, 1999.

After reviewing her Application, the Fund informed Plaintiff by letter dated August 27, 2001 that "[a]ccording to the information contained in your application, you will be eligible for a Disability Benefit from [the] Fund, commencing on August 1, 1999." Letter from Erica K. Edwards, Pension Benefit Calculator, to Plaintiff of 8/27/01 ("Award Letter") at 1 (attached to Defs.' Mem. at Exh. B). The Award Letter also explained the procedures for appealing the award to the Fund's Retirement Committee ("Retirement Committee"). Id. at 2-3. On October 6, 2001, Plaintiff's daughters appealed the Award on her behalf of to the Retirement Committee, requesting that Plaintiff be awarded benefits retroactive to her SSA Eligibility Date, December 1, 1996, notwithstanding Section 8.1 of the Plan, on the grounds that she was unable to file earlier because her "delicate state of health . . . hindered her from pro-actively coordinating her plans for a secure future." Pl.'s Exh. 2 at 1 ("First Reconsideration Letter").

On December 7, 2001, the Fund increased the amount of Plaintiff's monthly award from $476 to $515. Letter from Lynette Ahwah, Pension Supervisor to Plaintiff of 12/7/01 (attached to Defs.' Mem. at Exh. E). On December 18, 2001, the Fund denied Plaintiff's request for Pre-Award Benefits in a letter stating that

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Booklet would defeat the purpose of providing the employees with summaries").

"[u]nder the rules and regulations of the 1199 Pension Plan, your pension is effective the month following the month in which your application for pension was received. Although you were awarded Disability from the [SSA] from 1996, your Disability Pension [commencement] date . . . cannot be earlier than (2) two years prior to the date of filing of the application with the Fund Office." Letter from Erika L. Edwards, Pension Benefit Calculator, to Plaintiff of 12/18/01, at 1 (attached to Complaint at Exh. 3).

On June 6, 2002, Plaintiff requested that the Fund reconsider its denial of the Pre-Award Benefits. Letter from Barry L. Salkin to 1199 Fund of 6/6/02 ("Second Reconsideration Letter") (attached to Complaint at Exh. 4). Specifically, the Second Reconsideration Letter stated that "the doctrine of equitable tolling can be applied to the time limitation set forth in ERISA qualified plans where a claimant has shown that she acted with reasonable diligence and is able to point to particular facts and circumstances indicating the fairness of applying the doctrine." Id. The Reconsideration Letter went on to state that "it is particularly appropriate to apply the [equitable tolling] doctrine in this case," because "[Plaintiff] has a very significant mental disorder which precluded her from filing for disability benefits with the Fund." Id. at 1-2.

In connection with "Plaintiff's second level appeal," the Fund's Retirement Committee held a hearing on August 8, 2002. Defs.' R. 56.1 at ¶ 19. By a letter dated August 13, 2002, the Fund denied Plaintiff's reconsideration letter on the following grounds: "[1] the Retirement Committee ruled that the doctrine of equitable tolling was inapplicable to the rule stated in

[Section 8.1] of the Plan, because this rule is not a procedural rule akin to a statute of limitations (i.e., an absolute bar to receiving benefits under the Plan), but a substantive rule governing the amount of benefits payable to a Plan participant. [2] [The] Retirement Committee ruled that even if the equitable tolling doctrine applied to [Section 8.1] of the Plan, [Plaintiff] has not made a sufficient showing to apply the rule [because] some statements submitted by [Plaintiff's] daughters indicate that she did not file for a disability pension because she was not aware of such a benefit. Her situation differs from a typical case in the equitable tolling area where a plaintiff's mental illness actively interferes with a right to access their benefits." Letter from Roderick D. Gorham, Pension Fund Director, to Barry L. Salkin of 8/13/02 (attached to Complaint at Exh. 7).

By a letter dated October 2, 2002, Plaintiff requested that the Fund again reconsider its denial of the Pre-Award Benefits. Letter of Barry L. Salkin to Roderick D. Gorham, dated 10/2/02, attached to Complaint at Exh. 8 ("Third Reconsideration Letter"). That request was denied by the Fund on October 23, 2002. Letter of Emily Drucker to Barry L. Salkin, dated 10/23/02, attached to Complaint at Exh. 9. Plaintiff filed the instant Complaint on June 23, 2003.

III Legal Standard

Summary judgment is authorized when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment

as a matter of law." Fed. R. Civ. P. 56(c); Sansevera v. E.I. DuPont de Nemours & Co., 859 F. Supp. 106, 110 (S.D.N.Y. 1994). "In examining the record, the court must resolve all ambiguities and draw all reasonable inferences in favor of the nonmoving party." Sansevera, 859 F. Supp. at 110 (citing Gibson v. American Broadcasting Cos. Inc., 892 F.2d 1128, 1132 (2d Cir. 1989)). "The judge's role in summary judgment is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Sansevera, 959 F. Supp. at 110 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)); see also Carrion v. Enterprise Ass'n Metal Trades Branch Local Union 638, 227 F.3d 29, 32-33 (2d Cir. 2000).

"The burden falls on the moving party to establish that no relevant facts are in dispute." Donahue v. Windsor Locks Bd. of Fire Comm'rs, 834 F.2d 54, 57 (2d Cir. 1987). "Once the movant has satisfied its burden, the party opposing summary judgment must set forth specific facts showing that there is a genuine issue for trial." Moriarity v. United Techs. Corp. Represented Employees Retirement Plan, 947 F. Supp. 43, 47 (D. Conn. 1996), aff'd 158 F.3d 157 (2d. Cir. 1998); see also Fed. R. Civ. P. 56(e). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Under ERISA. "claimants must pursue all administrative remedies provided by their plan pursuant to statute . . . in the event benefits are denied." Chapman v. ChoiceCare Long Island Term Disability Plan, 288

F.3d 506, 511 (2d Cir. 2002); Kennedy v. Empire Blue Cross & Blue Shield, 989 F. 2d 588, 694 (2d Cir.1993). "In ERISA cases, the standard for summary judgment must also be viewed in conjunction with the standard of review of administrative actions under the ERISA guidelines." Diagnostic Med. Assocs. v. Guardian Life Ins. Co., 157 F. Supp. 2d 292, 297 (S.D.N.Y. 2001). A denial of benefits "is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989); see also Mario v. P & C Food Mkts., Inc., 313 F.3d 758,763 (2d Cir. 2002).

If an ERISA plan insurer or administrator can establish that "the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan," then a court reviewing a denial of benefits to a policyholder must apply the more deferential arbitrary and capricious standard. Firestone, 489 U.S. at 115; Celardo v. GNY Auto Dealers Health & Welfare Trust, 318 F.3d 142,145-46 (2d Cir. 2003). The plan administrator or fiduciary bears the burden of proving that the arbitrary and capricious standard applies. Fay v. Oxford Health Plan, 287 F.3d 96,104 (2d Cir. 2002); Kinstler v. First Reliance Standard Life Ins. Co., 181 F.3d 243, 249 (2d Cir. 1999); see also Cook v. New York Times Co. Long-Term Disability Plan, No. 02 Civ. 9154, 2004 WL 203111, at *2 (S.D.N.Y. Jan. 30, 2004). "Under the arbitrary and capricious standard of review, we may overturn a decision to deny benefits only if it was without reason, unsupported by substantial evidence or erroneous as a matter of law . . . . This scope of review is

narrow, thus we are not free to substitute our own judgment for that of [the plan committee] as if we were considering the issue of eligibility anew." Pagan v NYNEX Pension Plan, 52 F.3d 438, 442 (2d Cir. 1995); see also Peterson v. Continental Cas. Co., 282 F.3d 112, 117 (2d Cir. 2002) ("It is well established that federal courts have a narrow role in reviewing the discretionary acts of ERISA plan administrators."); Aramony v. United Way Replacement Benefit Plan, 191 F.3d 140,149 (2d Cir. 1999) ("[U]nambiguous language in an ERISA plan must be interpreted and enforced in accordance with its plain meaning.")

IV. Analysis

A. Exhaustion of Remedies

After the initial denial by the Fund of the Pre-Award, Benefits on August 27. 7.001, Plaintiff filed an appeal to the Fund by letter from her daughters to the Fund on October 6, 2001; she later filed a second-level appeal with the Fund through her attorney on dune 6, 2002. See First and Second Reconsideration Letters. Both of these appeal applications were denied by the Fund. See Complaint at Exhs. 3 and 7. Plaintiff also requested reconsideration of the denial of the Pre-Award Benefits through a letter from her attorney to the Fund, dated October 2, 2002, even though there is no provision in the flan for a third level of review." Defs.' Mem. at 13; see also Third Reconsideration Letter. The Fund replied that its "determination that the doctrine of equitable tolling is inapplicable to the rule in Section 8.1 renders a rehearing on the additional facts presented in your letter a futile exercise." Letter from Emily Drucker to Barry L. Salkin of 10/23/02, at 1 (attached to

Complaint at Exh. 9). The Court concludes that Plaintiff has exhausted all remedies within the Fund's claims procedures and is permitted to bring a civil action. 29 U.S.C. § 1132(a)(1)(B) ("A civil action may be brought . . . by a participant or beneficiary . . . to recover benefits due to trim under the terms of his plan, to enforce his rights under the plan, or to clarify his rights to future benefits under the terms of the plan").

B. The Fund's Reasonable Interpretation of Plan Provisions

The Fund claims that "[b]ecause the Plan grants discretionary authority to the plan administrator, this Court must review the [Fund's] decision to deny Plaintiff additional disability pension benefits under the arbitrary and capricious standard." Def.'s Mem. at 17. Plaintiff counters that the Fund administrator's authority "to administer, apply and construe, (and] interpret the Plan . . . is a limited discretion [and] is not a grant of plenary discretion," and, therefore, *de novo* review, rather than review under an arbitrary and capricious standard, should be applied. Pl.'s Mem. at 6. Plaintiffs claim is unpersuasive.

The Plan provides that "[b]enefits will be paid only if the Plan Administrator decides in its discretion that the applicant is entitled to them under the terms of the Plan and Summary Plan Description . . . Notwithstanding any other provision in the Plan and to the full extent permitted by ERISA and the Internal Revenue Code, the Plan Administrator shall have the exclusive right, power and authority, in its sole and absolute discretion . . . To administer, apply, construe and to decide all matters arising in connection with

entitlement to benefits, the and duration of benefits and the operation or administration of the Plan . . . To make all factual determinations required to administer, apply, construe and interpret the Plan . . . [T]he Plan Administrator shall have the ultimate discretionary authority to (i) Determine whether any individual is eligible for any benefits under this Plan; (ii) Determine; the amount of benefits, if any, an individual as entitled to under this, Plan; (iii) Interpret all provisions of this Plan . . . (iv) Interpret all terms used in this Plan . . . (vi) Decide questions, including legal or factual questions, relating to the eligibility for, or calculation and payment of benefits under the Plan; (vii) Resolve and/or clarify any ambiguities, inconsistencies and omissions arising under the Plan . . . ." Plan at 58.

The United States Court of Appeals for the Second Circuit has held that such language granting discretionary authority to the plan administrator invokes application of the arbitrary capricious standard of review. See e.g., Pochodav v. Building Servs., 32 B-J Pension Fund, 5 Fed. Appx. 16, 20 (2d Cir. 2001) ("Because the Plan expressly gave the Trustees of the 32B-7 Fund discretionary authority to determine eligibility and interpret the provisions of the plan, the denial of [plaintiff's] benefits is reviewed for whether the Trustees' ruling was arbitrary and capricious," Jordan v. Retirement Comm. of Rensselaer Polytechnic Inst., 46 F.3d 1264, 1254 (2d Cir. 1995) (arbitrary and capricious standard applies where retirement committee, was granted broad discretion to interpret plan); see also Administrative Comm. of Time Warner Inc. v. Biscardi, No. 99 Civ.12270, 2000 WL 1721168, at *7 (S.D.N.Y. Nov. 17, 2000) (arbitrary and capricious standard applies where committee was given "exclusive right to interpret

the plan and to decide any matters arising in connection with the administration and operation of the plan").

Here, the Plan grants the Fund broad discretionary authority to interpret and administer the Plan provisions, providing that "the Plan Administrator shall have the ultimate discretionary authority to . . . (iii) Interpret all provisions of this Plan." Plan at 58. Thus, the arbitrary and capricious standard of review applies to the Fund's interpretation of Section 8.1.

Plaintiff claims (unpersuasively) that the Plan includes "the unstated condition" that equitable tolling applies to the Plan, and that tolling "must be read into any provision of an employee benefit plan under ERISA that contains a time limit." Pl.'s Mem. at 13. She further claims that the Fund is required to "infer" that equitable tolling is applicable to the Plan because such an inference would be consistent with the reasonable expectation of the insured," and would be consistent with "administering the Plan in accordance with its terms."[4] Pl.'s Mem. at 12.

The Fund has determined that "two years," as reflected in Section 8.1 of the Plan and the SPD, means two years and that equitable tolling does not expand retroactivity benefits under Section 8.1. The Fund followed the unambiguous express terms of Section 8.1 which state that "the payment commencement date of the Disability Pension Benefit shall be the first day of the month in which the payment of the Participant's Social Security disability benefit commence(d), but no earlier than two (2) years prior to the date of filing of the application for the Disability Pension Benefit with the

Fund Office." Plan at 93, Section 8.1 (emphasis added).[4] The Fund reasonably interpreted the Plan and its decision to deny Plaintiff disability benefits prior to August 1, 1999 was neither arbitrary nor capricious. Pochoday, 5 Fed. Appx. at 20; Pagan, 52 F.3d at 442; see also Miles v New York State Teamsters Conference Pension & Retirement Fund Employee Pension Ben. Plan, 698 F.2d 593 (2d Cir. 1983) ("Where both the trustees of a pension fund and a rejected applicant offer rational, though conflicting, interpretations of plan provisions, the trustees' interpretation must be allowed to control.").

C. The Chapman Case

Plaintiff asserts that the Plan's procedures are unreasonable because they do not offer "fundamental fairness . . . to a person suffering from a severe mental disorder." Pl.'s Mem. at16. She asserts that "to avoid injustice, the circumstances of this case require the [Court's] application of equitable tolling" Id., at 7. Plaintiff' seeks to rely on Chapman v. ChoiceCare Long Island Term Disability Plan, 288 F.3d 506 (2d Cir. 2002), for the proposition that "equitable tolling" is appropriate where the claimant has "offered a particularized description of how her [mental] condition adversely affected her capacity to function generally or in relationship to pursuit of her rights." Pl.'s Mem.

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[4] Similarly, the SPD states: "Retroactive benefits are not paid for any time earlier than two years before you filed your application for Disability Pension Benefits with the Pension Fund." SPD at 33.

Although not mentioning Chapman by name, the Fund counters persuasively that "the doctrine of equitable tolling is inapplicable to the two year maximum retroactive disability benefit rule . . . because it is not a limitation period at all. It is not an absolute bar to receiving benefits under the Plan. Rather, it is a substantive rule governing the amount of benefits payable to a Plan participant. As such, there is no limitation period that bars participants from filing for their benefits after a specified time frame. Disability pension benefits can be applied for at any time. Since there is no limitation period, either in the statute or the Plan, there is nothing to toll." Defs.' Mem. at 19 (citations omitted).

The Court concludes that Chapman does not support Plaintiff's position. In Chapman, the plaintiff, who suffered from "rapidly cycling bipolar disorder," Chapman v. ChoiceCare Long Island Term Disability Plan. 98-CV-4475, slip op. at 2 (E.D.N.Y. May 28, 2004), ceased work on "January 19, 1995, after which ... she could no longer perform her duties because of [the] disability." Chapman 288 F.3d at 508. "Plaintiff submitted in November 1996 a long term disability benefits application to [her insurance company]." Id. The insurance company denied plaintiffs claim as untimely and also informed the plaintiff "that a written request for review of a. claims denial, must be sent within 60 days of the receipt of the notice of denial and absent such a request, the claims decision will be final." Id. The plaintiff's attorney requested such a review ten days after the 60-day deadline, presumably because, as a result of plaintiff's mental condition, her attorneys "were uncertain as to whether she wanted to pursue an appeal and whether she had retained them for the task." Id. at

512. The insurance company concluded that plaintiff's "request for [appellate] review was also untimely" as a result of the ten day delay. Id. at 509.

The plaintiff filed a complaint in the United States District Court for the Eastern District of New York against the plan (but not the insurance company) seeking "(1) a declaratory judgment that from January 29, 1995 she was continuously disabled under the Plan's provisions and (2) an order for the Plan to pay her disability benefits." Id. at 509. The district court granted summary judgment to the defendant, concluding that the "plan in this case is not the proper defendant," and that plaintiff failed to exhaust her remedies because her "appeal letter was untimely temporally and the time is not tolled via the doctrine of equitable tolling." Transcript of hearing before Denis Burley, J., dated February 23, 2001 at 18, 24.

The Court of Appeals reversed, concluding that "a plan is a proper defendant in an action to recover benefits under § 1132(a)(1)(B)." Chapman, 288 F.3d at 509. The Court also noted that it had "never squarely held that [equitable tolling] applies to time limits that are specified in plan provisions;" it determined not to reach the issue because the (64-day) time limit the plan sought to enforce was "not set out in either the policy or the Summary Plan Description, [thus raising a question] as to whether the Plan was entitled to enforce it." Id. at 511.[5]

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[5] The Court of Appeals remanded Chapman to the district court to decide "whether the 60 day time limit is enforceable given that such limitation is not mentioned in

Chapman is inapposite. Here, both the Plan and SPD clearly provide that benefits will not be paid "earlier than two (2) years prior to the date of the filing of the application . . . ." Plan at 93 (emphasis added); see also SPD at 33. And, in the instant case, unlike Chapman, Plaintiff's right to a hearing and/or administrative review was recognized. Indeed, plaintiff received at least two levels of review, including a hearing on August 8, 2002.[6]

Gluszak v. Local 147 Tunnel Workers Retirement Fund, No. 91 Civ. 2098, 1991 WL 207605 (S.DN.Y, 1991) is instructive to the case at bar. In Gluszak, plaintiff claimed that his disability pension benefit award should have been retroactive to his SSA eligibility date, December 22, 1986, rather than to May 1, 1989, the month after he filed for benefits. In Gluszak, the plaintiff was unable to engage in any work as of December 22, 1980 as a result of "pulmonary silicosis and irritative bronchitis related to his employment as a tunnel worker." Id. at *1 n.2. The plan in Gluszak provided that a beneficiary must "must file a written application for benefits with the Board of

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either the policy or the Summary Plan Description." Id. at 514. The Court of Appeals also stated that "if the district court reaches the equitable tolling argument, we think the proof proffered by claimant's counsel is sufficient to warrant an evidentiary hearing on the question of whether plaintiff's mental illness impaired counsel's efforts to file a timely request for review." Id. at 511.

[6] Plaintiff concedes that "the instant case does not . . . involve constitutional due process." Pl.'s Br. at 16.

Trustees on a form that will be provided upon request by the Fund Office. Application for retirement benefits must be filed in advance. Benefit payments will not be paid for any period prior to the first of the month following the date of your application." Id. at *4 (emphasis added). The fund in Gluszak determined that the plaintiff was "eligible to receive . . . benefits because of his disability, beginning May 1, 1989, the first day of the month following receipt of plaintiff s application by the Fund in accordance with the Plan." Id. at *1.

The plaintiff in Gluszak filed a complaint in Federal court alleging that the fund "should have made his disability pension benefit retroactive to January 1, 1987, the first of the month 'following the date the Social Security Administration determined to be plaintiff's date of disability (December 22, 1986)." Id. He asserted that "he was orally told by [the fund manager] that he could not file for disability until the Social Security determination was received. Id.

In granting the defendants' motion for summary judgment, the District Court for the Southern District of New York, Martin, J., adopted the fund's position that "summary judgment should be granted because plaintiff's contentions regarding his application for Social Security benefits . . . are irrelevant to the issues before the Court." Id. at *2. The court concluded that under the arbitrary and capricious standard, it "must uphold a pension plan interpretation, even if the Court disagrees with it, so long as that interpretation is rationally related to a valid plan purpose and is not contrary to the plain language of the plan. The valid purpose served by the filing requirement is evident. The Trustees have made a determination that a hard and fast

rule is necessary: a plan participant must first file an application before any benefits are paid. There is nothing arbitrary or capricious in this decision," Id. at *3 (citations omitted).

V. Conclusion and Order

For the reasons stated above, Defendants' Motion for Summary Judgment is granted.

Dated: New York, New York
June 7, 2004

RICHARD M. BERMAN, U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURTHOUSE
40 FOLEY SQUARE
NEW YORK 1007

Roseann B. MacKechnie
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 19th day of August two thousand five.

Milma Garcia-Ramos

Plaintiff-Appellant,

v. 04-3720-cv

The 1199 Health Care Employees Pension Fund and The Trustees of the 1199 Healthcare Employees Pension Fund,

Defendants-Appellees.

A petition for panel rehearing and a. petition for rehearing en banc having been filed herein by the appellant. Upon consideration-by the panel that decided the appeal it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en bane has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Roseann B. MacKechnie, Clerk

By:_____
Motion Staff Attorney